Testimony of Rodger Kershner
Howard & Howard Attorneys PLLC
Before the House Committee on
Intergovernmental and Regional Affairs
June 23, 2009

Good afternoon, Chair Donigan and Members of the Committee.

My name is Rodger Kershner. I am a partner with the law firm of Howard and Howard Attorneys PLLC. I have been providing legal counsel to developers, owners and operators of electric power generation facilities for more than 20 years. In that time I have had the honor to serve as Senior Vice President and General Counsel to CMS Energy Corporation and have served as outside legal counsel to a number of national and international developers of conventional and alternative power projects.

Howard & Howard represents developers and builders of wind farms and the owners of the lands on which those projects are built. We are the legal advisors to the Michigan Wholesale Power Association. I am here today to testify in support of SB 430.

In connection with advising companies wishing to invest in energy infrastructure projects in Michigan, an unintended consequence of a 60 year old statute has come to light which has the potential to slow or prevent some very good investments in this state. For that reason your consideration of this Bill is very timely. You will recall that Michigan's energy policy was dramatically re-written last fall when Public Act 295 of 2008, the Clean, Renewable and Efficient Energy Act, became law. As required by that act, Consumers Energy and Detroit Edison have submitted to the Public Service Commission Renewable Energy Plans outlining how they will provide 10% of the electricity they sell in the form of renewable energy. According to the utilities, each will predominately rely on wind turbines to generate renewable energy. Of course, this was an anticipated outcome when Act 295 was passed, because Michigan also hopes to capture the manufacturing jobs related to the development of a wind-related industry in our state.

Unfortunately, some underlying obstacles still exist that could slow the pace of development of wind power in Michigan and related job creation. One such potential obstacle is found in the "Airport Zoning Act." As we read it, SB 430 is intended to remove that obstacle.

The Airport Zoning Act pertains to zoning in name only. Neither the Airport Zoning Act nor SB 430 has any effect on the power of local governments to enact or enforce local zoning of land.

The Airport Zoning Act became law in 1950. As originally envisioned, local governments would form a body which would issue permits to locate tall structures near local airports. According to the act, if the flight approaches to local airports encompassed areas in more than one local jurisdiction, joint intergovernmental boards were to be formed, and joint controlling ordinances or resolutions had to be passed. If a structure (regardless of that structure's purpose) is proposed to be placed within flight path areas, a permit to construct it is required and should be issued automatically if certain height and distance criteria are met. Otherwise, the act provides that variances from height restrictions may be sought. This approach required a significant amount of intergovernmental cooperation, the naming of several boards, and a complicated appeals procedure.

About ten years after the Airport Zoning Act was enacted, Michigan passed a new law called the Tall Structures Act. The Tall Structures Act is a more comprehensive approach to issues which relate to the height of structures permitted around airports and is administered by the state Department of Transportation. The FAA also has regulations that must be followed.

As a consequence of the more recent and comprehensive approach to such issues, it has been our experience that many of the boards and processes required by the Airport Zoning Act have fallen into disuse and may no longer be functioning, as their former role

in many places has been supplanted by newer legislation and regulatory requirements. These newer requirements continue to protect the public interest. Nevertheless, permitting requirements continue to exist under the Airport Zoning Act. It can often be difficult to obtain such permits, not because of the related public interest issues but because the bodies that were to review such matters are no longer in existence.

In some cases this can cause very significant delays. Financial institutions that provide the capital needed to build large projects typically required that before funds can be provided all local, state and federal requirements be met, including permitting. Therefore, while more modern statutes serve an overlapping purpose, the requirement of a permit such as the one at issue here could unintentionally delay or prevent the type of investments that Michigan needs at this moment.

SB 430 strikes a reasonable balance. The bill does not repeal the Airport Zoning Act. Instead, the bill first requires a developer to receive a permit under the Tall Structures Act and also requires a developer to make a permit request under the Airport Zoning Act, but places a 90 day limit on the time that such a request can be pending. In this way, those local governments that still maintain the organizations required by the Airport Zoning Act can continue to influence the decision-making process. Those without such organizations, however, will not unduly delay the development already permitted under the Tall Structures Act.

We appreciate your consideration of Bill 430, and urge its passage. I will be happy to address any questions you may have.